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Case Number 271,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEWARD L. NORTHAN, JR., Appellant-Plaintiff Below, v. KELLY THOMAS and RUSSELL TRAVIS HOVATTER, Appellees-Defendants Below.	No. 271,2024 Court Below: Superior Court of the State of Delaware C.A. No. S23C-03-006 CAK

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

Appellant-Plaintiff Below Steward L. Northan, Jr. ("Plaintiff") filed this wrongful death action against Appellees-Defendants Below Kelly Thomas ("Thomas") and Russell Travis Hovatter ("Hovatter") on March 7, 2023, in the Superior Court of the State of Delaware in Sussex County. After some initial discovery, counsel for the parties agreed to allow Thomas to file, before discovery was complete, a motion for summary judgment on the potentially dispositive issue of contributory recklessness. The parties agreed that, if Defendant Thomas lost her motion for summary judgment, discovery would resume without any party having waived any other argument, claim, or defense, including procuring expert witnesses.

On January 30, 2024, Thomas filed her Motion for Summary Judgment asserting that the contributory recklessness of Plaintiff's decedent, Stewart Northan, III, ("Northan"), barred Plaintiff's claims and that Northan had assumed the risk of his death. Plaintiff responded on March 18, 2024, opposing Thomas' Motion for Summary Judgment arguing contributory reckless had been abrogated, that degrees of culpability were factual issues for a jury to determine, and that, even if Northan was contributorily reckless, Thomas was negligent or reckless and the actual proximate cause of Northan's death. Thomas filed a Reply on March 28, 2024. Hovatter filed a Response to Thomas' Motion for Summary Judgment on April 10, 2024, in which Hovatter improperly asserted his own arguments for summary

judgment. Thomas responded to Hovatter's filing on May 1, 2024, and Plaintiff responded to Hovatter's filing on May 21, 2024.

The Superior Court held oral argument on May 30, 2024, at which time counsel for Thomas informed the Superior Court that Thomas would no longer be pursuing the assumption of risk argument. Counsel for Hovatter clarified that Hovatter was joining in Thomas' argument for contributory recklessness such that if the Court found the doctrine to apply, it should bar any claim against Hovatter also.

On June 12, 2024, the Superior Court issued a Memorandum Opinion and Order. In Footnote 1 of that decision, the Superior Court recognized the parties' procedural agreement. The Court stated

> [t]he parties agreed to stipulate to these facts solely for purposes of the Motion for Summary Judgment, even though discovery has not been completed in this case, so that I could consider the single potentially dispositive issue of contributory recklessness. They did not waive their rights to develop and dispute other facts, such as Thomas' drinking and potential drag racing between Decedent and Hovatter, should I deny the Motion for Summary Judgment.

The Superior Court granted Thomas and Hovatter's Motions for Summary Judgment on the grounds that Northan's contributory recklessness barred any claims Plaintiff had against Thomas and Hovatter. The Superior Court also determined Northan was reckless as a matter of law in the collision that caused his death. The Superior Court

also incorrectly stated the parties informed the Court at oral argument it need not rule on the issue of intervening/superseding cause.

On July 11, 2024, Plaintiff timely filed his Notice of Appeal with this Court appealing the Superior Court's June 12, 2024 Memorandum Opinion and Order. The Superior Court erred in (a) finding that contributory recklessness was not abrogated by the adoption of the comparative negligence statute; (b) in finding that Northan's actions were reckless as a matter of law; and (c) in determining that the issue of intervening/superseding cause was no longer before the Court.

SUMMARY OF ARGUMENT

1. The Superior Court erred when it revived the dead and buried doctrine of contributory recklessness on June 16, 2024, because: (a) the Delaware Supreme Court has twice allowed this doctrine to remain a relic of the past; (b) the Superior Court's decision ignored the public policy of Delaware to retreat from harsh rules of common law which barred a plaintiff's recovery solely based on plaintiff's culpability; (c) the Superior Court erred in failing to broadly interpret Delaware's remedial comparative negligence statute; and (d) the Superior Court erred in disregarding the Delaware Courts' trend towards an analysis of comparative culpability.

2. Regardless of whether contributory recklessness survived the adoption of Delaware's comparative negligence statute, the Superior Court erred by taking the question of the existence and degrees of comparative culpability out of the hands of the jury and making that decision itself in violation of the Delaware Constitution's broad protections for jury trials in civil cases.

3. Finally, the Superior Court erred when it failed to even consider Plaintiff's argument that Northan's recklessness was not the proximate cause of his injury. The Superior Court stated that argument was withdrawn at oral argument when that was not the case.

STATEMENT OF FACTS

On Sunday, March 7, 2021, Defendant Thomas was day drinking, travelling to different breweries in Maryland and Delaware. (JA68:24 – JA69:6, JA107:14 – JA108:4, JA209:10-13, JA225:6-20.) In the afternoon, Thomas was driving her SUV eastbound on Allens Mill Road, intending to make a left hand turn to go northbound on Route 13. (JA70:13-17, JA77:21 – JA79:9, JA90:6 – JA91:3, JA108:5-23.) At the intersection of Route 13 and Allens Mill Road, Route 13 is a straight and level divided highway with two lanes going north and two lanes going south. (JA71:12 – JA72:16.) For drivers, such as Thomas, making a left-hand turn from Allens Mill Road onto northbound Route 13, the median of Route 13 at that intersection provides an area where a vehicle can stop after crossing the southbound lanes before turning onto and proceeding in the northbound lanes. (JA71:12 – JA72:16, JA78:11-18.)

Thomas stopped for the stop sign that controlled traffic on Allens Mill Road before proceeding onto U.S. Route 13. (JA71:12 – JA72:16, JA77:21 – JA79:9; JA83:11 – JA84:2.) At the same time, Plaintiff's decedent, Northan, was riding his motorcycle southbound on Route 13. (JA68:24 – JA69:6, JA70:1-8, JA77:21 – JA79:9.) Although Thomas acknowledged seeing two motorcycles coming toward her as she waited at the intersection, she "pulled out to begin to make the left turn onto . . . [Route 13] and cross over the southbound lands." (JA77:21 – JA79:9,

JA108:5-23, JA180:18 – JA181:2, JA220:12-24.) At approximately the same time, Defendant Hovatter was driving a sedan in the right-hand southbound lane of Route 13. (JA69:21 – JA70:21; Depo of K. Fleming at JA355:4-19, Appx. 6.) A witness, Kayla Fleming ("Fleming"), who was riding in Hovatter's vehicle, saw Thomas pull out in front of the Hovatter vehicle, and she thought they were going to hit Thomas when she pulled out. (JA341:17 – JA343:18; JA346:3-11.) Hovatter also said Thomas "darted out", while Albert said "she pulled out in a normal fashion." (JA110:23 – JA111:8.) Fleming testified Thomas started "moving at a decent speed" to get across Route 13's southbound lanes, but then Thomas "stopped dead in the middle of the road" before Stewart hit her vehicle. (JA342:13-24, JA369:8 – JA377:12.) Another witness, who was behind Thomas, Lynn Twilley ("Twilley"), corroborated that Thomas applied her brakes before getting fully across the southbound lanes of Route 13. (JA436:10 – JA437:5.) She had a clear view of the southbound lane from Allens Mill Road. (JA437:10-18.) At approximately 3:20, p.m., the front of Northan's motorcycle hit the rear driver's side of Thomas's SUV in the left-hand southbound lane of Route 13 killing Northan. (JA73:1 – JA79:9, JA85:22 – JA86:2, JA176:8-12.)

The Chief Investigating Officer was Corporal Ryan Albert ("Albert"). (JA66:11-17.) Albert detected alcohol on Thomas' breath when he interviewed her in a car approximately an hour and 15 minutes after the collision. (JA103:22 –

JA105:10, JA186:20 – JA187:8, JA190:20 – JA191:5; JA304:2-11.) During her field sobriety test, Thomas gave several indications she might be impaired, including her eyes jerking and her inability to consistently walk heel to toe as instructed. (JA201:17 – JA207:2.) A four-pack of beer was found in the back floorboard of Thomas's vehicle. (JA189:10 – JA190:9.) Three were still sealed, but one was open and empty. A cap that matched the open bottle was found in the floorboard. (JA193:13 – JA194:12.) Over two hours and twenty minutes after the collision, at 5:45 p.m., Thomas submitted to a breathalyzer, which yielded a blood alcohol content ("BAC") result of 0.069. (JA197:18-JA198:2, JA211:21-24.) Thomas submitted to a blood draw at 6:43 p.m., which yielded a BAC result of 0.60. (JA197:18 – JA198:2, JA212:1-6.) Albert acknowledged the delay in testing could result in a lower blood alcohol content. (JA214:11-18, JA234:12-15.) Astonishingly, Thomas was not charged with driving under the influence solely because of the officers' delay in testing her. (JA207:9 – JA209:24, JA210:4 – JA214:18, JA234:1 – 23 JA300:2 – JA303:1.)

ARGUMENT

I. The Superior Court Erred In Determining that Contributory Recklessness Was Still a Viable Legal Doctrine in Delaware.

a. Question Presented

Did the Superior Court commit reversible error when it held that contributory recklessness survived the adoption of Delaware's comparative negligence statute despite this Court's precedent leaving the doctrine in the dustbin of history and the state's public policy of favoring remedial statutes retreating from the harsh rules of the common law? (JA463-67; JA526-532; JA556-57)

b. Scope of Review

Review of a summary judgment decision by this Court is *de novo*. *AeroGlobal Capital Mgmt., LLC, v. Cirrus Indus., Inc.*, 871 A.2d 428, 443 (Del. 2005) (internal citations omitted); *Atamian v. Gorkin*, 746 A.2d 275, 2000 Del. LEXIS 15, at *7 (Del. 2000) (TABLE). Thus, in considering this appeal, Defendants, as the moving parties, "(1) . . . bear[] the burden of demonstrating both the absence of a material issue of fact and entitlement to judgment as a matter of law, and (2) any doubt concerning the existence of a factual dispute must be resolved in favor of the non-movant[, Northan]." *Atamian*, 2000 Del. LEXIS 15, at *8. Defendants must also "show that the only reasonable inferences that could be drawn from the facts are adverse to plaintiff." *Raczkowski v. Devlin*, 2011 WL 5042064, at *1 (Del. Super.

Oct. 10, 2011). Finally, Court cannot make credibility determinations at the summary judgment stage. *Cerberus Int'l, Ltd. Appollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002). Summary judgment under Rule 56, while encouraged to dispose of some cases before trial, is not an "absolute right" and "should be granted only 'if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" *AeroGlobal*, 871 A.2d at 443 (internal citations omitted).

c. Merits of Argument

Contributory recklessness was a common law defense to a defendant's reckless conduct and was based upon Section 482 of the Restatement of Torts. *Wagner v. Shanks*, 194 A.2d 701, 707 (Del. 1963). Subsection 2 of Section 482 provided "'A plaintiff is barred from recovery for harm caused by the defendant's reckless disregard for the plaintiff's safety if, knowing of the defendant's reckless misconduct and the danger involved to him therein, the plaintiff recklessly exposes himself thereto.'" *Id.* (*quoting* Restatement of Torts, § 482). Contributory recklessness was again discussed by this Court, where it stated that a plaintiff's contributory recklessness could serve as a complete bar to a claim based upon the defendant's reckless conduct. *Gushen v. Penn Cent. Transp. Co.*, 280 A.2d 708, 710 (Del. 1971). The doctrine was last addressed by this Court in 1990 in a case the facts

of which occurred prior to the enactment of the comparative negligence statute. *Staats v. Lawrence*, 1990 Del. LEXIS 301, at *1, *6-7 (Del. Oct. 3, 1990).

In 1984, the General Assembly adopted Delaware's comparative negligence statute, which provides:

> In all actions brought to recover damages for negligence which results in death or injury to person or property, the fact that the plaintiff may have been contributorily negligent shall not bar a recovery by the plaintiff or the plaintiff's legal representative where such negligence was not greater than the negligence of the defendant or the combined negligence of all defendants against whom recovery is sought, but any damages awarded shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

10 Del. C. § 8132 ("Section 8132"). As explained below, the Delaware Courts appeared to accept that the doctrine of contributory recklessness was presumed dead and buried after the enactment of Section 8132. For over thirty-three years, the doctrine laid dormant until the Superior Court below erroneously revived it by holding that Northan was reckless as a matter of law thereby precluding any claim(s) he may have against Thomas for her negligence or recklessness and Hovatter for his negligence or recklessness. For the reasons that follow, the Superior Court erred in reviving the doctrine of contributory recklessness.

i. The Superior Court erred in disregarding this Court's precedent in which it has twice suggested contributory recklessness was no longer viable after the adoption of comparative negligence

This Court has recognized – twice – that contributory recklessness was abrogated by Delaware's adoption of Section 8132 in 1984. The first time this Court acknowledged that contributory recklessness was abated by the enactment of Section 8132 was explicit and soon after that statute's enactment. *Staats*, 1990 Del. LEXIS 301, at *1, 6-7. *Staats* involved three men who were drinking and driving. *Staats v. Lawrence*, 576 A.2d 663, 664 (Del. Super. 1990). The plaintiff passenger, who had been too drunk to continue driving, climbed out onto the roof of the car while it was moving. *Id.* The plaintiff fell off the roof and was injured. *Id.* The plaintiff brought claims against the driver for negligent and wanton conduct. *Id.* Finding the plaintiff violated a statute that prohibited riding on the top of a car without the driver's consent, the Superior Court found the plaintiff contributorily negligent and contributorily reckless as a matter of law. *Id.* at 665-668.

In affirming the Superior Court's decision on appeal, the Supreme Court discussed the "defenses of contributory negligence, contributory wanton conduct, and assumption of the risk" and stated, ***"[b]ecause the accident occurred before Delaware's comparative negligence statute became effective, proof of these defenses is a complete defense*** to the claims made on behalf of" the plaintiff. 1990 Del. LEXIS 301, at *1 n.1 (emphasis added). The Supreme Court explicitly referred to all three "defenses" rather than solely the "defense" of contributory negligence as viable because the incident occurred prior to the adoption of comparative negligence.

That statement acknowledged that both contributory negligence and contributory recklessness were abated by the enactment of Section 8132.[1]

The second time this Court acknowledged that contributory recklessness was abated by the enactment of Section 8132 was implicit. *Trievel v. Sabo*, 714 A.2d 742 (Del. 1998). *Trievel* involved a woman who rode her bicycle across a major four-lane highway and into the path of an oncoming truck. *Id.* at 743. In the underlying decision granting the defendant judgment as a matter of law after the plaintiff had presented its case in chief to the jury, the Superior Court found the plaintiff's decedent "clearly contributorily negligent" whose conduct "clearly approached wanton behavior." *Trievel v. Sabo*, 1997 Del. Super. LEXIS 128, at *1-2, 10 (May 2, 1997) (Quillen, J.) The Superior Court continued, "***if the law would permit contributory wantonness, and if she had been hit by a driver driving wantonly,*** the Court would have, on request, submitted contributory wantonness to the jury." *Id.* at *11 (emphasis added). Hence, the Superior Court recognized contributory recklessness did not survive the adoption of comparative negligence. The case was appealed to this Court, which held that the plaintiff's decedent was comparatively negligent more than the defendant as a matter of law. 714 A.2d at 746. The words

[1] Only assumption of the risk survived the adoption of comparative negligence. But subsequent decisions have even concluded secondary assumption of the risk was subsumed by comparative negligence. *Koutoufaris v. Dick*, 604 A.2d 390, 398 (Del. 1992).

"reckless" and "wanton" do not appear in this Court's decision in *Trievel*. Certainly if the Superior Court had been wrong about the law not permitting contributory wantonness, this Court could have easily – even in *dicta* – corrected the Superior Court. But it did not do so. Thus, the Court implicitly and correctly acknowledged contributory recklessness was a relic of the past.

ii. The Superior Court erred in not following the public policy of Delaware to move away from rigid rules focusing solely on a plaintiff's culpability

Section 8132 was a legislative statement that Delaware policy was retreating from the inflexible and unforgiving rules of the common law where any culpability by the plaintiff barred recovery. *Koutoufaris v. Dick*, 604 A.2d 390, 398 (Del. 1992). In *Koutoufaris*, a waitress was attacked in her car in a restaurant's parking lot after work. *Id.* at 393. The area of the parking lot where the plaintiff was attacked was obscured from view and inadequately lit. *Id.* at 394. The parking lot had a history of crime over the preceding four years, and the majority of the victims of those crimes were employees of the restaurant. *Id.*

In arguing that the verdict in favor of the plaintiff should be vacated, the defendant landowner argued Section 343A of the Restatement (Second) of Torts limited its liability where the waitress knew of the dangerous condition on the land. *Id.* at 395. This Court analyzed that, under Section 343A, some Courts interpreted the plaintiff's knowledge as a limitation on a landowner's duty meaning there was

no negligence if a danger was open and obvious to the plaintiff. *Id.* 396. Other courts, however, "held that comparative negligence negates the operation of the knowledge element in § 343A as a complete bar to liability." *Id.* at 396-97. This Court followed the view of the latter group of Courts and concluded

> In our view, adoption of a comparative negligence standard in 1984 manifests a legislative intention from that date to ***retreat from a system of inflexible and unforgiving rules in favor of evaluation of the plaintiff's conduct*** on a case-by-case basis . . . If §343A is interpreted as a duty limiting provision, it retains its character as an inflexible legal rule the sole focus of which is upon ***whether the plaintiff was in any way culpable*** in not appreciating the hazard created or permitted by the defendant. Thus, if the plaintiff was aware of the danger, no liability arises on the part of the landowner even though on a comparative basis, the plaintiff's error in judgment in not appreciating the risk might be far less blameworthy than defendant's conduct in creating the risk or failing to eliminate it. Such a result is clearly at variance with the legislative intent that, where negligence is reflected in the conduct of both parties, liability, and consequent recovery, be determined proportionately.

Id. at 398 (emphasis added). This Court affirmed the Superior Court's decision to not grant a jury instruction that limited the defendant landowner's duty based upon the plaintiff's knowledge. *Id.*

Just like the provision in Section 343A that potentially limited the duty of the landowner in *Koutoufaris* based upon the plaintiff's conduct, contributory recklessness does the exact same thing. The Superior Court's decision below notes a defendant is relieved from all liability if a plaintiff's conduct is reckless. (Mem.

Op. & Order, June 12, 2024, at 6-7.) The Superior cited the pre- Section 8132 case of *Gushen* and the Restatement of Torts (Second), § 503(3), a section that has never been cited or adopted by this Court. *Koutoufaris* made a broad statement that Delaware's public policy, as evidenced by the enactment of Section 8132, was to move away from focusing on the plaintiff's conduct, and the Superior Court's decision is in derogation of that pronouncement. Therefore, the Superior Court's decision must be reversed based upon *Koutoufaris*.

The Superior Court below, however, made an additional error based upon *Koutoufaris*. One of the issues in *Koutoufaris* involved a jury instruction reading "contributory negligence is not a defense to wanton or reckless conduct." 604 A.2d at 398. Setting aside the context in which that issue arose, which is irrelevant for present purposes, this Court stated the instruction was "not, in itself, an incorrect statement of the law." *Id.* at 399. The Superior Court leapt from that simple statement to the conclusion that "'recklessness' falls outside of the comparative negligent statute." (Mem. Opinion & Order, June 12, 2024, at 10.) The Superior Court erred, however, in making that jump. Plaintiff concedes that a plaintiff's lower degree of comparative culpability, such as negligence, is not a defense to a higher degree of a defendant's culpability, such as recklessness. *Koutoufaris* and *Wagner* teach as much. *Koutoufaris*, 604 A.2d at 399; *Wagner*, 194 A.2d at 707 (*quoting* Restatement of Torts, Section 482(1)). But when the degrees of culpability for the

plaintiff and defendant are the same, such as when both are reckless, they should be compared under Section 8132.

Assuming a jury finds them to both be reckless, Northan's recklessness should be compared to Thomas and/or Hovatter's recklessness. *See Givens v. City of Chi.*, 184 N.E.3d 501, 514-15 (Ill. App. Ct. 2021). *Givens* involved burglars who broke into an electronics store who were then shot by city police. *Id.* at 505. Following a trial that resulted in a verdict for one of the burglar-plaintiffs, the city filed a motion for judgment notwithstanding the verdict, which was granted. *Id.* at 505-06. The plaintiffs appealed asserting, in part, that their damages should have been offset based upon comparative culpability and the city's assertion of that defense. *Id.* at 510. The issue before the Court was "whether a tort claimant's own reckless willful and wanton conduct precludes him from recovering against a reckless willful and wanton defendant." *Id.* at 511.[2] Noting the state's comparative culpability statute was stricken as unconstitutional "for other reasons," the Court explained it attempted to codify the existing common law. *Id.* at 515. The Court recounted that (a) a

[2] Illinois treats "willful and wanton conduct" differently than Delaware. It is "often alleged in conjunction with negligence and can be either intentional or reckless." *Givens*, 184 N.E.3d at 510. For purposes of this argument, however, the modifying words "negligent", "reckless", and "intentional" appear to have the same meaning as do those terms in Delaware. In other words, the phrase "willful and wanton conduct" is modified by the terms "negligent", "reckless", and "intentional" which is the key term in the analysis. For example, the decision notes that "reckless willful and wanton conduct . . . is a heightened standard." *Id.* at 513.

plaintiff's intentional conduct bars recovery against a defendant's reckless or intentional conduct; (b) a plaintiff's negligent or reckless conduct does not preclude recovery against a defendant who behaves intentionally and the plaintiff's damages are not reduced based upon comparative fault principles; and (c) a plaintiff's reckless conduct does not bar recovery against a reckless defendant, but plaintiff's damages are reduced based upon comparative fault principles. *Id.* at 513. Therefore, the burglar-plaintiff could recover from the city because both were reckless, but the plaintiff's recovery would be reduced by the plaintiff's portion of fault. *Id.* at 506, 513, 520. The Court noted this was inconsistent with Section 503(3) of the Restatement (Second) of Torts, which was quoted by the Superior Court below, and older case law. *Id.* at 514; *see also Joseph v. State*, 26 P.3d 459, 471-72 (Alaska 2001) (declining to follow Section 503(3) of the Restatement (Second) of Torts because comment c to that Section states "in general, the effect of [a] plaintiff's reckless disregard of his own safety is the same as that of his ordinary contributory negligence" and because contributory negligence was not a complete bar to recovery and only reduced the plaintiff's recovery by the proportion of the plaintiff's fault). The trial court was reversed and remanded. *Givens*, 184 N.E.3d at 526.

In light of the public policy of Delaware to retreat from the harsh effects of focusing on a plaintiff's culpability, this Court should decline to follow Section 503 of the Restatement (Second) of Torts and follow the well-reasoned decision in

Givens to allow, assuming a jury finds recklessness, Northan's recklessness to be compared with Thomas' and/or Hovatter's recklessness and reduce any recovery to Northan by his share of culpability.

iii. The Superior Court erred in requiring Section 8132 to be ambiguous before effecting its remedial purpose

Section 8132 serves a remedial purpose and should be construed broadly without first finding it is ambiguous. This Court has repeatedly taught that remedial statutes are those that "remedy the harshness of the common law" or otherwise provide a remedy for a wrong. *Young v. Joyce*, 351 A.2d 857, 859 (Del. 1975); *In re Estate of Klingaman*, 128 A.2d 311, 313 (Del. 1957). In those situations, statutes that remedy the harsh outcomes of the common law – like Section 8132 did for the law of contributory negligence – should be construed "as broadly as possible." *Klingman*, 128 A.2d at 313. The Superior Court thus erred in strictly construing Section 8132 based upon the proposition that Section 8132 is in derogation of the common law and should therefore be construed narrowly. (Mem. Op. & Order, June 12, 2024, at 8.) In fact, 67 years ago, this Court, considering the applicability of a statute governing inheritance by children born out of wedlock, stated

> [w]e think there is no room here for the application of the ***rule that a statute in derogation of the common law must be strictly construed. This is a rule of little aid in modern times***, . . . and certainly has no force in the case before us. We are then to effectuate as far as reasonably possible the announced intention of the legislature to relax the harshness of the common law.

Id. (emphasis added). Moreover, the Superior Court subsequently stated that "one of the most common exceptions to the principle that a statute in derogation of the common law is to be read strictly is that a statute viewed to be remedial in nature is entitled to a liberal construction." *MCI Telecomm. Corp. v. Wanzer*, 1990 Del. Super. LEXIS 222, at *26 n.22 (Del. Super. June 19, 1990). Over the years, numerous Delaware statutes have been held to be remedial in nature and thus construed broadly to effect their remedial purpose. *See e.g., Reid v. Spazio*, 970 A.2d 176, 181 (Del. 2009) (*en banc*) (savings statute); *see also Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, at 1256 (Del. 2011) (statutes allowing for victims of sexual abuse to bring claims); *Del. Tire Ctr. v. Fox*, 411 A.2d 606, 607 (Del. 1980) (workers' compensation statute); *Gosnell v. Whetsel*, 198 A.2d 924, 927 (Del. 1964) (savings statute); *Klingaman*, 128 A.2d 311 (estate distributions for children born out of wedlock).

Moreover, unlike normal rules of statutory construction, ambiguity in a remedial statute is not a condition precedent to giving a remedial statute a broad interpretation. In *Reid*, a minority shareholder of two Delaware companies initially filed a lawsuit individually and derivatively in a federal court in Texas alleging the companies conspired to appropriate opportunities for themselves to the detriment of him and the companies. 970 A.2d at 179. That case was dismissed by agreement, and the plaintiff re-filed the case in a Texas state court. *Id.* That case was dismissed,

and the dismissal was upheld on appeal. *Id.* The plaintiff then filed an action in the Court of Chancery relying on the Delaware Savings Statute because the action would have been otherwise time barred. *Id.* The Court of Chancery held that the most applicable prong of the Savings Statute did not save plaintiff's claim and dismissed the action. *Id.*

This Court reversed the Court of Chancery. *Id.* at 184. The Court noted "[t]he Savings Statute reflects a public policy preference for deciding cases on their merits." *Id.* at 180. Thus, it "is remedial in nature and is liberally construed." *Id.* at 181. No ambiguity was claimed. This Court's decision does not mention the word "ambiguous" or any derivative thereof, leading to the conclusion that ambiguity is not a precondition to its remedial construction. *See also Sheehan*, 15 A.3d 1247 (no ambiguity claimed but the Court construed the statute more broadly than the plain language would suggest); *Del. Tire Ctr.*, 411 A.2d 606 (no ambiguity claimed); *Gosnell*, 198 A.2d 924 (no ambiguity claimed); *Klingaman*, 128 A.2d 311 (no ambiguity claimed). Just like the Savings Statute, Section 8132 "manifests a legislative intention from that date to ***retreat from a system of inflexible and unforgiving rules in favor of evaluation of the plaintiff's conduct*** on a case-by-case basis." *Koutoufaris v. Dick*, 604 A.2d 390, 398 (Del. 1992) (emphasis added). Accordingly, legal rules, "the sole focus of which is upon ***whether the plaintiff was in any way culpable*** in not appreciating the hazard created or permitted by the

defendant", should be rejected. *Id.* Thus, just like the Savings Statute, Section 8132 is a public policy preference. Accordingly, like the Savings Statute, Section 8132 should also be liberally construed.

This Court has suggested that remedial statutes are those that allow the recoupment of losses caused by a wrong or harm. *Young*, 351 A.2d at 859. Indeed, the Savings Statute, statutes allowing sexual abuse victims to bring claims, and the consumer protection act at issue in *Young* all do precisely that. That is why *Leatherbury v. Greenspun*, which the Superior Court cited for the proposition that statutes must first be ambiguous before being given their full remedial effect, is inapposite. 939 A.2d 1284 (Del. 2007). The statute at issue in *Leatherbury* was a statute directing ***how*** to mail Notices of Intent to extend the statute of limitations for medical malpractice claims. *Id.* at 1287. While a statute extending a statute of limitations is likely remedial, a statute specifying how to mail something to do so is not. Indeed, the *Leatherbury* plaintiff advocated the statute was remedial and should be construed liberally, but this Court never held the mailing statute was remedial. Thus, it required the statute to be ambiguous before engaging in statutory construction.

Finally, the outcome in *Russo v. Ziegler* was determined not because of the remedial nature or absence of remedial nature of Section 8132 but because of the language of the dog bite statute. 67 A.3d 536 (Del. Super. 2013). The Superior Court

in *Russo* specifically stated "[a]llocation-of-fault statutes are not applicable in dob-gite actions under liability statutes like 9 Del. C. § 913 unless expressly stated." *Id.* at 541. The Superior Court stated Section 8132 is narrowly construed, but the decision offered no support for that proposition. *Id.* That statement appears to be *dicta*, as *Russo*'s outcome is based upon the language of the dog bite statute rather than Section 8132.

In short, this Court's previous focus on a plaintiff's "conduct" and "culpability" suggests Section 8132 was intended to be remedial in nature and broadly construed to effectuate that purpose. The Superior Court erred in requiring ambiguity in the statute before giving it a broad interpretation consistent with its remedial purpose.

iv. The Superior Court erred in failing to note the evolution of the Delaware Courts' approach to comparative fault

Over time and likely because of the remedial nature of Section 8132, Delaware Courts moved from a system of comparative negligence to a system of comparative fault. This move began with the adoption of comparative negligence and retreat from the old, inflexible contributory negligence rule. *Koutoufaris*, 604 A.2d at 398. Since this Court's pronouncement above in *Koutoufaris*, this Court has gone a step further and referred to the analysis as one of "comparative fault" rather than "comparative negligence." *Helm v. 206 Mass. Ave., LLC*, 107 A.3d 1074, 1081 (Del. 2014). The lower courts have followed suit as the Superior Court has also

adopted the moniker of "comparative fault." S*ee, e.g., Hooven v. Gimelstob*, 2021 Del. Super. LEXIS 445, at *5 (June 1, 2021); *West v. E. Coast Prop. Mgmt.*, 2020 Del. Super. LEXIS 2966, at *3 (Dec. 9, 2020); *Robinson v. Reg'l Hematology & Oncology, P.A.*, 2018 Del. Super. LEXIS 203, at *4 (May 8, 2018).

The Superior Court has permitted comparison of fault even when the plaintiff is arguably grossly negligent or reckless. In *Jackson v. Thompson*, the Superior Court denied summary judgment so a jury could compare the plaintiff's potentially reckless behavior to that of the potentially negligent conduct of the defendant. 2000 Del. Super. LEXIS 413, at *6 (Del. Super. Oct. 12, 2000). The defendant rear-ended a bicycle that was operated by a plaintiff whose "reckless or negligent conduct" included riding a bicycle on Route 13 in the rain while wearing dark clothing, lacking proper illumination, and under the influence of alcohol. *Id.* at *4-5. The defendant argued plaintiff's reckless conduct entitled defendant to judgment as a matter of law. *Id.* at *4. Noting it must construe the facts in favor of the plaintiff, the court explained the plaintiff's lack of illumination and riding under the influence would have to be "weighed by the trier of fact against" the defendant's conduct. *Id.* at *6, 8. Nothing in the case suggested the defendant was anything more than negligent, but the Court allowed the jury to make the decision.

In *Bishop v. Progressive Direct Ins. Co.*, 2016 Del. Super LEXIS 632, at *1 (Dec. 15, 2016), the Court considered cross motions for summary judgment where

both parties were potentially reckless. In an unusual fact pattern, the plaintiff rear-ended the defendant's insured's vehicle. *Id.* at *2. The plaintiff asserted the defendant's insured had been harassing a third driver, who was trying to get away from the defendant's insured. *Id.* The defendant's insured then positioned his vehicle in front of the third driver's vehicle and slammed on his brakes. *Id.* This caused plaintiff to strike the defendant's insured's vehicle. *Id.* at *3. The defendant claimed that the plaintiff could not have been traveling at the speed limit and as far behind the defendant's insured's vehicle as the plaintiff claimed. *Id.* The court found that both the defendant's insured and the plaintiff could potentially be reckless. *Id.* at *6-8. The Court noted if the defendant engaged in reckless conduct, then the plaintiff's comparative fault might be irrelevant. *Id.* at *7-8.

In *Hufford v. Moore*, 2007 Del. Super. LEXIS 367, at *7 (Del. Super. Nov. 8, 2007), summary judgment was denied where plaintiff may have been grossly negligent and the defendants may have been reckless. In *Hufford*, the defendant pursued the plaintiff in a high-speed vehicle chase. *Id.* at *1-2. Because the defendant vehicle was getting closer to his vehicle, the plaintiff turned out his headlights, made a turn, and then turned his lights on again after driving a short distance. *Id.* at *2-3. Shortly thereafter, the plaintiff failed to negotiate a turn and crashed his vehicle into a tree. *Id.* at *3. The "[p]laintiff was unsure whether he was still being followed at the exact time of the accident." *Id.* The defendants sought

summary judgment on the ground the plaintiff was grossly negligent barring recovery. *Id.* at *3-4, 6. Noting the defendants could be found to be reckless, the court determined plaintiff's gross negligence did not necessarily bar his recovery. *Id.* at *6-7.

The Superior Court below, ignoring the remedial purpose of Section 8132 and precedent from this Court and the Superior Court, focused heavily on the fact that the word "recklessness" does not appear Section 8132 to reject the application of comparative fault. But at least three other states, whose comparative culpability statutes only mention the words "negligence", also allow the comparison of gross negligence and/or wanton/willful conduct under their statutes. *Compare* Colo. Rev. Stat § 13-21-111 (speaks of negligence only) *with G.E.C. Minerals, Inc. v. Harrison W. Corp.*, 781 P.2d 115, 116 (Colo. App. 1989) (holding "the statute requires the comparison of each party's fault irrespective of whether such fault is attributable to simple negligence, gross negligence, or willful and reckless negligence"); *compare* Miss. Code Ann. § 11-7-15 (speaks of negligence only) *with McClellan v. Ill. Cent. R. R. Co.*, 37 So. 2d 738, 452 (Miss. 1948) (permitting a comparison of plaintiff's gross negligence against defendant's negligence); *compare* Neb. Rev. Stat. § 25-21,185.09 (speaks of negligence only) *with Baldwin v. City of Omaha*, 607 N.W.2d 841, 854-55 (Neb. 2000) (finding plaintiff's recklessness is still compared to a defendant's negligence under the comparative negligence statute). Therefore, the

Delaware Courts are not unique in their approach to comparative fault even when their comparative culpability statutes only speak of negligence.

Succinctly, once comparative negligence became the law, Delaware Courts acknowledged contributory recklessness was gone and simply stopped talking about it. This Court has not addressed it since 1990, and, even then, this Court said it did not survive the adoption of Section 8132. *Staats*, 1990 Del. LEXIS 301, at *1 n.1 *Koutoufaris* noted Section 8132 was an intentional retreat away from rigid rules that focused solely on a plaintiff's culpability. *Koutoufaris*, 604 A.2d at 398 From there, Delaware Courts focused more on comparative fault or culpability. For failing to follow all of these reasons, the Superior Court below's grant of summary judgment for Thomas and Hovatter should be reversed. The matter should be remanded with instructions to allow a jury to determine and compare degrees of culpability of the parties.

II. The Superior Court Erred In Not Submitting the Existence and Degrees of Culpability to a Jury When It Determined Northan Was Reckless As a Matter of Law

a. Question Presented

Did the Superior Court commit reversible error when it determined that Northan was reckless as a matter of law when Thomas was likely driving under the influence, pulled out in front of traffic on a busy road, and stopped in Northan's travel lane before reaching the median? (JA 466-67; JA522-26; JA530; JA 533-35; JA540-44; JA556-57)

b. Scope of Review

This Court reviews the Superior Court's decision on summary judgment under a "*de novo* standard of review on appeal." *AeroGlobal*, 871 A.2d at 443. Northan incorporates by reference the standard of review as explained *supra* in Subsection **Error! Reference source not found.**.

c. Merits of Argument

Regardless of whether contributory recklessness exists or not, a jury – not the Superior Court – should determine and compare the degrees of the parties' culpability. "[T]he right to a jury trial in civil proceedings has always been and remains exclusively protected by provisions in the Delaware Constitution." *Baird v. Owczarek*, 93 A.3d 1222, 1226 (Del. 2014). As this Court explained in *Baird*, "the General Assembly included several significant provisions regarding the right to trial

by jury" in the 1897 Constitution. *Id.* First, Article I, Section 4 "provided for the right to trial by jury as 'heretofore.'" *Id.* (internal citations omitted). But it also added a new section, Article IV, Section 19, that provided,

> "Judges shall not charge juries with respect to matters of *fact*, but may state the questions of *fact* in issue and declare the law." The reason given during the Constitutional Debates for the adoption of Section 19 was to ensure "that Judges shall confine themselves to their business, which is to adjudge the law and leave *juries to determine the facts*."

Id. at 1226-27 (internal citations omitted) (emphasis in original). This Court therefore concluded in *Baird* that "under the Delaware Constitution, an essential element of the right to trial by jury is for verdicts to be based solely on *factual determinations* that are made from the evidence presented at trial." *Id.* at 1227 (emphasis in original). The Superior Court violated Plaintiff's Constitutionally-granted right to a jury in this civil matter by determining Northan was reckless as a matter of law.

In reaching the conclusion that Northan was reckless as a matter of law, the Superior Court relied upon this Court's decision in *Trievel*. 714 A.2d 742. *Trievel* involved a woman who initially walked her bicycle into the lane of a major four-lane highway and then, mid-lane, mounted the bike to continue across the highway. *Id.* As she crossed into the next lane, however, she was struck and killed by an oncoming truck. *Id.* at 743. In doing so, the woman did not cross a crosswalk, ignored traffic signs, and mounted her bike mid-lane before crossing into the passing lane. *Id.* at

745. On the other hand, the plaintiff presented seven eyewitnesses at trial none of whom implicated the defendant. *Id.* at 746.

This Court began its analysis by stating "questions as to the existence of negligence" and "the determination of the respective degrees of negligence attributable to the parties usually present[] a question of fact for the jury. *Id.* at 745. But the Court found *Trievel* to be "one of those rare cases" "where the evidence require[d] a finding [by the court] that a plaintiff's negligence exceeded that of the defendant." *Id.* This Court recounted the facts in evidence and concluded that "[b]ecause the overwhelming evidence, viewed in the light most favorable to the . . . [p]laintiffs, can only lead to the conclusion that [plaintiff's] negligence was greater than any negligence attributable to" the defendant, the Superior Court's decision should be affirmed. *Id.* at 746.

Unlike *Trievel*, this is not one of those rare cases where the Superior Court should have determined Northan's negligent or reckless conduct exceeded that of Thomas. This is especially true because the Superior Court ignored facts that were harmful to Thomas and failed to give Plaintiff the benefit of all reasonable inferences. Indeed considering all of the facts and inferences, Northan's conduct – standing alone without the involvement of Thomas – may not have even been reckless in a jury's eyes. First, the Superior Court ignored the facts that the driver behind Thomas noted that they had a clear view of southbound traffic on Route 13,

that Thomas "darted out" in front of the Hovatter vehicle and Northan's motorcycle, and that two witnesses stated that Thomas slowed or stopped in the left-hand travel lane of Route 13 southbound before reaching the median. (JA437:10-18; JA110:23 – JA111:8; JA342:13-24; JA369:8 – JA377:12; JA436:10 – JA437:5.) Significantly, Albert's testimony creates a disputed fact because he claims "she pulled out in a normal fashion." (JA111:3-8.)

Second, Thomas was likely driving under the influence of alcohol. *See* 21 Del. C. § 4177; JA207:9 – JA209:24, JA210:4 – JA214:18, JA234:1 – 23 JA300:2 – JA303:1. While her BAC was below the legal limit when she was finally tested over two hours following the collision, it was still only 0.012 short of being over the legal limit. 21 Del. C. § 4177. According to Albert, this delay in testing allowed Thomas' BAC to decrease and may have affected the BAC test results. (JA207:9 – JA209:24, JA210:4 – JA214:18, JA234:1 – 23 JA300:2 – JA303:1.) Given the clues of impairment, the open container in the vehicle, and this delay, it is more than a reasonable inference that Thomas was legally intoxicated at the time of the collision. Thus, unlike in *Trievel* where seven eyewitnesses – put on by the plaintiff – could not attribute fault to the defendant, Plaintiff produced two independent eyewitnesses whose combined testimony at a minimum show Thomas was negligent. When Plaintiff is given the benefit of the reasonable inference that Thomas was driving under the influence, Thomas' conduct becomes even more negligent if not reckless.

Finally, Trievel is inapposite as a procedural matter. *Trievel* was an appeal from a judgment as a matter of law after the plaintiff had presented all of its evidence to a jury. *Id.* at 743. Here, because of the unique posture of Thomas Motion for Summary Judgment, Plaintiff had not even completed discovery let alone presented evidence to a jury. In denying the defendant's motion for summary judgment in *Jackson*, the Superior Court explicitly distinguished *Trievel* for the same reason. 2000 Del. Super. LEXIS 413, at *4.[3] Thus *Trievel* was not an analogous case on which the Superior Court should have granted summary judgment to Thomas and Hovatter.

Therefore, the general rule remains that the existence of culpability and the degrees of relative culpability are typically questions left for the jury. *Trievel*, 714 A.2d at 745. Cases already cited herein illustrate the general rule. In *Gushen*, a jury found the plaintiff contributorily negligent where he attempted to cross three sets of train tracks on a busy road, at night, and during a storm that significantly decreased visibility. 280 A.2d at 709. This Court remanded the case to determine if that conduct amounted to recklessness. *Id.* at 710. The Court in *Jackson*, faced with an arguably reckless plaintiff and an arguably negligent defendant, stated "[d]etermining the visibility of [the plaintiff] and the reasonableness of [the

[3] Jackson also distinguished Trievel because Jackson did not involve any eyewitnesses. 2000 Del. Super. LEXIS 413, at *4.

defendant's] actions with respect to [the plaintiff] that morning are material issues of fact that must be determined by a jury." *Id.* at *6. The *Bishop* Court, faced with a speeding tailgating plaintiff and a road raging defendant, denied summary judgment allowing the facts to be determined by a jury. 2016 Del. Super. LEXIS 632, at *8-9. And the *Hufford* Court, faced with a plaintiff driving fast without his headlights off while being pursued by baseball bat wielding defendant, allowed the factual questions of culpability to go to the jury. 2007 Del. Super. LEXIS 367, at *2-3, 7.

If all of these cases presented factual questions of culpability for the jury to determine, then so does the case before the Court. While Northan may have been driving in an unsafe manner, Thomas was driving under the influence, pulled out in front of traffic on a busy road, and stopped before reaching the median. This Court should reverse the Superior Court and remand the case with instructions to allow a jury to determine the existence and relative degrees of culpability.

III. The Superior Court Erred When It Incorrectly Deferred the Issue of Proximate Causation, the Resolution of Which Would Have Precluded Summary Judgment

a. Question Presented

Did the Superior Court commit reversible error when it failed to rule on the issue of proximate cause when it was squarely before the Court? (JA470-71; JA536-39; JA542-44)

b. Scope of Review

This Court reviews the Superior Court's decision on summary judgment under a "*de novo* standard of review on appeal." *AeroGlobal*, 871 A.2d at 443. Northan incorporates by reference the standard of review as explained *supra* in Subsection **Error! Reference source not found.**.

c. Merits of Argument

As noted above, the Superior Court stated in its decision that the parties essentially abandoned their arguments about intervening/superseding cause at oral argument. (Mem. Op. & Order, June 12, 2024, at 5 n.2). That is not accurate as is apparent from the transcript. (JA495-560.) Thus, the Superior Court erred in failing to consider Plaintiff's argument that Thomas' negligent/reckless actions were an intervening/superseding cause that broke the causal connection between Northan's reckless conduct and his death. At a minimum, it should be a question for a jury.

Assuming without conceding (a) the existence of contributory recklessness and (b) Northan's recklessness, Thomas' recklessness was an intervening and superseding event in Northan's conduct that prevents Northan's recklessness from being the proximate cause of his death. *Duphily v. Del. Elec. Coop., Inc.*, 662 A.2d 821, 829 (Del. 1995). Delaware's rule for proximate cause is the "but for" test, and Thomas's "'conduct is a cause if the event would not have occurred but for that conduct.'" *Culver v. Bennett*, 588 A.2d 1094, 1097 (Del. 1991) (internal citations omitted). But for contributory recklessness to apply, Northan's contributory recklessness would also have to be a proximate cause. *See id.* Here, Northan's conduct, standing alone, would not have resulted in his death and is therefore not a proximate cause. Fleming testified she heard Northan accelerate his motorcycle behind them. (JA341:17 – JA345:6.) After she heard Northan accelerate, Thomas's vehicle darted out onto Route 13. (JA342:7-19; JA110:23 – JA111:2.) Albert's testimony creates a disputed fact because he claims "she pulled out in a normal fashion." (JA111:3-8.) But by virtue of stopping at a stop sign and waiting to turn left, Thomas had to yield the right of way to Northan but failed to do so. 21 Del. C. §§ 4132 & 4164. Giving Plaintiff the benefit of all inferences, her ability to judge oncoming vehicles was likely impaired by her alcohol consumption. Therefore, even if Northan was going over 141 miles per hour, his reckless conduct was broken by Thomas's subsequent intervening recklessness of drinking and driving and failing to

yield the right of way. *Duphily*, 662 A.2d at 829. Foreseeable results of Northan's allegedly reckless behavior would have included someone changing lanes onto him or striking debris in the road causing a wreck. But Thomas's day drinking in the middle of a Sunday afternoon causing her failure to yield the right of way was neither anticipated nor reasonably foreseeable to Northan. Thomas' reckless behavior therefore was a superseding event and should be submitted to the jury to resolve factual disputes. *Culver*, 588 A.2d at 1098; *Duncan v. STTCPL, LLC*, 2020 Del. Super. LEXIS 91, at *14 (Del. Super. Feb. 19, 2020); *see* JA111:6-8 (Albert disputes Thomas "darted out" and says she "pulled out in a normal fashion).

CONCLUSION

Until June 12, 2024, contributory recklessness was a relic of the past, abated by the adoption of Delaware's comparative negligence statute. The Superior Court erred in reviving that doctrine and further erred in determining that Northan was reckless as a matter of law without allowing a jury to make determinations of the existence and relative degrees of culpability. Finally, the Superior Court erred in failing to consider Plaintiff's intervening/superseding cause arguments. For the reasons stated herein, any reasons in Plaintiff's Reply Brief, any reasons stated at oral argument, and any reasons apparent to this Court, the Superior Court's decision of June 12, 2024, should be reversed and remanded.

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